No. 85-1277

In The
Supreme Court of the United States
October Term, 1985

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, *et al.*,
Petitioners,

v.

GENE H. ARLINE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA JOINED BY MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW YORK AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI

Amici States, pursuant to Supreme Court Rule 36.4, have filed this brief in support of respondent to emphasize their concern that discrimination against persons with communicable diseases remain covered as discrimination on the basis of handicap, precluded by Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794.

As with other forms of discrimination against the disabled, discrimination against persons with communicable diseases frequently results from irrational fears, mistaken assumptions and unfounded stereotypes. Often persons who have or carry communicable diseases pose no threat to others. Premature termination from productive employment deprives such persons of the ability to provide for themselves and deprives society of their productivity, creating a double burden on the State. In addition to employment discrimination, such persons may face discrimination in housing, health care or benefit programs. Amici States have an interest in protecting their inhabitants who suffer from communicable diseases from such arbitrary discrimination.

In addition, some of amici States have declared all or some communicable diseases to be protected as physical handicaps under state anti-discrimination laws. The exclusion of communicable diseases from coverage under federal law, as proposed in the briefs of Petitioner and the Solicitor General, could adversely affect the accomplishment of the goals of these state laws.

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SUMMARY OF ARGUMENT

This case involves the application of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, to discrimination against persons with communicable dis-

eases. A proper resolution requires an understanding of both communicable diseases and the statutory framework for redressing discrimination against disabled persons.

Communicable diseases exhibit extreme variety as to cause, mode of transmission, severity and duration. Generalizations about communicable diseases as a group or even about the "contagiousness" of particular diseases are often difficult.

Section 504 prohibits the exclusion of any "qualified handicapped person" from any program receiving federal assistance. It covers federally assisted housing, education, transportation, health care and benefit programs as well as employment. It was enacted with a broad remedial purpose and has been construed to cover a wide variety of conditions.

There is no basis in legislative history, case law or logic for excluding communicable diseases from coverage as handicaps under Section 504. Communicable diseases are physiological disorders affecting one or more body systems, which may substantially limit, or may be perceived as substantially limiting, major life activities including the ability to circulate freely with others, and therefore fit within the statutory and regulatory definition of handicap. It is consistent with both legislative history and case law interpreting Section 504 to construe the requirement of "handicap" broadly and then carefully evaluate whether a particular person is qualified for the program or position in question. The notion that a particular characteristic of a handicapping condition such as "contagiousness" may be separated out and excluded from coverage finds no support in case law or legislative history, and is antithetical to the broad, remedial purposes of the Act. Protection against irrational and medically unjustifiable discrimination is particularly necessary in the case of diseases that create apprehension in the general public.

To be protected under the Act, a handicapped person must also be found to be qualified to participate in the program in question. Whether a person with a communicable disease which is, or is perceived to be, "contagious" should be excluded from a federally assisted program is part of the determination whether the handicapped person is "otherwise qualified." Blanket rules regarding particular diseases are inappropriate; each case should be evaluated on an individual basis, in the same manner as other handicapping conditions which pose a risk of harm to others. Determinations of risk must be based on reasonable medical judgments founded on the available medical evidence. Because the record does not indicate the trial court performed the required analysis in the present case, the case should be remanded for reconsideration in light of the principles enunciated above.

A construction of Section 504 which includes communicable diseases will neither interfere with public health efforts to control communicable diseases nor upset the balance of state-federal relations. On the contrary it is consistent with the application of federal anti-discrimination law to a wide variety of state regulatory programs.

ARGUMENT

I. A PERSON WITH A COMMUNICABLE DISEASE IN A STAGE WHICH IS, OR IS PERCEIVED TO BE, TRANSMISSIBLE IS HANDICAPPED WITHIN THE MEANING OF SECTION 504.

This case of first impression, involving the discharge of an elementary school teacher with tuberculosis, presents the question whether communicable diseases are covered as "handicaps" within the meaning of Section 504 of the

Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. The District Court held that "contagious" diseases were not included in the definition of "handicapped person" in Section 504 (Pet. App. C., at 14). Petitioner reiterates this argument before this Court, supported by the Solicitor General, on behalf of the Attorney General and the United States as employer, contending that discrimination based on "contagiousness," or the fear thereof, is not unlawful. Brief of United States at 1-2, 15. The American Medical Association, the American Public Health Association and these amici States seriously dispute these contentions.

A correct determination regarding the scope of Section 504 requires an analysis of both the underlying medical concepts and the relevant statutory framework.

A. Communicable Diseases.

As the brief of the American Medical Association notes, the terms "infectious," "contagious," and "communicable" are often used imprecisely. Brief of AMA at 2, n. 2. "Communicable" diseases are those which are capable of being transmitted from person to person, at least at some stage of the disease. Communicable diseases are caused by infection by microorganisms such as bacteria or viruses. Transmission can occur by direct or indirect contact, by ingestion of contaminated food or water, or by insect vectors. "Communicable" disease is the generally accepted medical term for all transmissible diseases. *Stedman's Medical Dictionary* 315 (5th ed., 1982). "Contagion" or "contagiousness" denotes transmission by contact with the sick. It is generally a lay, and not a medical, term which antedates the modern conception of infectious diseases. *Ibid.* In fact, while the notion that certain diseases were capable of transmission by human con-

tact has been widespread among lay people since at least biblical times, the communicability of certain diseases did not become generally accepted in the medical profession until the early part of this century, concurrent with the acceptance of microorganisms as the cause of infectious diseases. C. Winslow, *The Conquest of Epidemic Disease* 181-183, 309-310, 367-376 (1943). With the understanding that infectious diseases were specific entities, each caused by a particular microorganism with specific modes of transmission, communicable diseases could be combatted by public health measures aimed at specific modes of transmission, such as disinfection of public water supplies and eradication of mosquitoes, and by methods of medical treatment that would neutralize or eliminate the disease causing organism, such as immunization and treatment with antibiotics. The control of communicable diseases in this century has thus moved from an emphasis on quarantine and isolation to public education and research into vaccines and disease fighting drugs. *Id.*, 364-366; P. Wehrle & F. Top, *Communicable and Infectious Diseases* (Ninth ed., 1981) 19-27, 29. Control of communicable diseases today depends on a precise understanding of the etiology and epidemiology of each disease. Given a proper course of treatment, individuals with communicable diseases rarely need to be isolated, and need to be restricted only from those particular activities by which the disease may be spread during the period when the disease can be transmitted. *See, e.g.*, Brief of AMA at 6-7.[1] The prevention of com-

1. In California's public health scheme complete isolation is required only for bubonic plague, cholera and diphtheria. For other diseases regulations may prescribe modified isolation with some restrictions on contacts or protection from insects. Specific instruction from a health officer regarding avoidance of transmission is required for tuberculosis and venereal disease. Relatively few diseases require restrictions on contacts. *See*, Cal. Admin. Code, Title 17, §§ 2550-2640.

(Continued on following page)

municable disease thus depends above all on accurate and effective public education about personal hygiene and the avoidance of disease transmission, as well as medical research into methods of treatment and immunization. C. Winslow, *The Conquest of Epidemic Diseases* at 364; P. Wehrle & F. Top, *Communicable and Infectious Diseases* at 20.

B. Statutory Framework.

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, provides in part that:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

"Handicapped individual" is defined in Section 7 of the Act, 29 U.S.C. § 706(7)(B), as:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(Continued from previous page)

In New York, health officials may require complete isolation in certain cases of communicable disease and when necessary to protect the public health. N.Y. Pub. Health Law § 2100 *et seq.* (McKinney 1985). Specific instructions exist for care, maintenance and conditions of isolation for typhoid fever. N.Y. Pub. Health Law § 2151 (McKinney 1985). Instructions regarding avoidance of transmission are required for tuberculosis and venereal disease. N.Y. Pub. Health Law §§ 2200 *et seq.*; 2300 *et seq.* (McKinney 1985). *See also* A. Benensen, *Control of Communicable Diseases in Man* (14th ed., 1985).

Regulations adopted by the Department of Health and Human Services found at 45 C.F.R. § 84.3(j)(2)(i) (1985) state that "physical or mental impairment" means:

> (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The regulations further amplify "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. § 84.3(j)(2)(ii) (1985).

Section 504 thus prohibits, in the context of this case, discrimination against persons who have or are regarded as having a "physiological disorder or condition" affecting a body system which "substantially limits" one or more major life activities.

Congress enacted the Rehabilitation Act with a broad remedial purpose. *See Consolidated Rail Corp. v. Darrone,* 465 U.S. 624 (1984); S. Rep. No. 1297, 93rd Cong., 2d Sess. 50 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388-6390, hereafter cited as S. Rep. No. 1297. The intent of the Act was to promote the integration of disabled persons into the mainstream of life and to prevent their unnecessary isolation. S. Rep. No. 890, 95th Cong., 2d Sess. 39 (1978).

Section 504 was "intended to be part of the general corpus of discrimination law," *New York State Ass'n for Retarded Children v. Carey,* 612 F.2d 644, 649 (2d Cir. 1979), like Title VI and VII of the Civil Rights Act of

1964, 42 U.S.C. § 2000d and § 2000e, Pub. L. 88-352, 78 Stat. 252. It was explicitly patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, Pub. L. 92-318, 86 Stat. 373. S. Rep. No. 1297 at 6390.

Although the Act originally contained a generally applicable definition of "handicapped individual" which focused on employability, now 29 U.S.C. § 706(7)(A), Pub. L. No. 93-112, § 7(6), 87 Stat. 361, Congress in 1974 added another definition, applicable to Section 504, which expands the focus beyond employability in order to fulfill Congress' broad remedial intent. 29 U.S.C. § 706(7)(B); S. Rep. No. 1297 at 6388-6390. The Act precludes discrimination in a broad range of federally financed programs including education and employment. *Consolidated Rail Corp. v. Darrone,* 465 U.S. at 632; 45 C.F.R. Pt. 84, App. A, Subpt. A (1985). It also applies to hospitals and other health care facilities, and public assistance programs. *Bowen v. American Hospital Ass'n,* 106 S.Ct. 2101 (1986); S. Rep. No. 1297 at 6388; 45 C.F.R. § 84.51; 45 C.F.R. Pt. 84, App. A (1985).

In addition to the broad range of programs to which the Act applies, it applies to a broad array of conditions. When Congress expanded the definition of "handicapped" in 1974, it included not just traditional handicaps such as blindness but all physical and mental impairments which limit one's major life activities. 29 U.S.C. § 706(7)(B). Both the regulations adopted by the Department of Health and Human Services and case law interpreting Section 504 have determined that it applies to chronic and non-chronic conditions and diseases. *See, e.g.,* 45 C.F.R. Pt. 84, App. A (1985); 41 Fed. Reg. 20298 (1976); *Pushkin v. Regents of the University of Colorado,* 658 F.2d 1372 (10th

Cir. 1981) (multiple sclerosis); *Drennon v. Philadelphia General Hospital,* 428 F.Supp 809 (E.D. Pa. 1977) (epilepsy); *Doe v. Region 13 Mental Health-Mental Retardation Commission,* 704 F.2d 1402 (5th Cir. 1983) (anxiety, depression and insomnia); *Bentivegna v. U.S. Dept. of Labor,* 694 F.2d 619 (9th Cir. 1982) (diabetes mellitus); *Treadwell v. Alexander,* 707 F.2d 473 (11th Cir. 1983) (heart condition including coronary by-pass and use of pacemaker); *City of Cleburne v. Cleburne Living Center,* 105 S.Ct. 3249, 3256 (1985) (mental retardation).[2]

The only qualification Congress made in this otherwise broad definition concerns persons disabled by drug or alcohol abuse. In 1978 Congress clarified that Section 504 did not require employment of persons "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B). Recovered alcoholics, or alcoholics in non-job related programs are covered. *E.g., Tinch v. Walters,* 765 F.2d 599 (6th Cir. 1985).

In addition, the Act clearly excludes from its coverage conditions which are not related to a physical or mental disorder, such as environmental, cultural and economic disadvantages. 45 C.F.R. Pt. 84, App. A (1985).

Finally, it should be observed that a determination that one is a "handicapped individual" does not ensure a successful suit. That is only the first part of a four part requirement for stating a cause of action under Section 504. In addition, Section 504 requires a finding that the

2. 29 U.S.C. § 706(7)(B)(ii) specifically includes persons who have recovered from an impairment.

person is "otherwise qualified" for the position, program, or benefit involved; that the discrimination was based on handicap and not on lack of qualifications; and that the program receives federal financial assistance. *Doe v. New York University,* 666 F.2d 761, 774-775 (2d Cir. 1981).

Thus, in addition to demonstrating that he or she has, or is perceived as having, the requisite physical or mental condition which substantially limits certain activities, a successful plaintiff in a Section 504 case must also show that despite such handicap he or she is qualified for the federally funded position, program or benefit and was excluded "solely by reason of handicap" and not on some legitimate criterion of eligibility. Where, as a result of the handicapping condition, the disabled person would be unable to perform the job functions, or otherwise participate adequately in the program in a manner which does not endanger others, he or she is not "otherwise qualified" and exclusion is not unlawful. *Southeastern Community College v. Davis,* 442 U.S. 397 (1979); *Doe v. New York University,* 666 F.2d at 777-779.[3]

It is generally through the "otherwise qualified" requirement that a determination of the validity of plaintiff's exclusion is made. The first requirement, being a "handicapped individual," has generally not been contested in Section 504 cases. *See de la Torres v. Bolger,* 781 F.2d 1134, 1137 (5th Cir. 1986). Individuals have been held

3. In other words, in the employment context, a plaintiff must be sufficiently impaired to be considered handicapped but not so impaired as to be unable to perform the functions of the job. Several courts have noted this "Catch 22." *Tudyman v. United Airlines,* 608 F.Supp. 739, 741-744 (C.D. Cal. 1984); *Doe v. Region 13 Mental Health-Mental Retardation Commission,* 704 F.2d at 1408, n. 6. A plaintiff who insists he or she is not impaired by a handicapping condition risks a determination that he or she is not a handicapped person. *E.g., Jasany v. United States Postal Service,* 755 F.2d 1244, 1250 (6th Cir. 1985).

not to be handicapped only where the condition was not properly considered a "disorder," such as lefthandedness, *de la Torres v. Bolger,* 781 F.2d at 1138, or not an "impairment," *Jasany v. United States Postal Service,* 755 F.2d 1244, 1250, n. 6 (6th Cir. 1985) (cross-eyed condition); *Tudyman v. United Airlines,* 608 F. Supp. 739, 746 (C.D. Cal. 1984) (excessive muscularity induced by bodybuilding); or not a "substantial limitation," *Oesterling v. Walters,* 760 F.2d 859, 861 (8th Cir. 1985) (varicose veins).

In short, to protect both individual and broad public interests, and to effectuate the remedial purposes of the Act, both congressional intent and case law support a broad construction of "handicapped" and careful attention to the individual's condition in determining whether he or she is "otherwise qualified."[4]

C. A Person With a Communicable Disease Which Is Or Is Perceived To Be "Contagious" May Be Handicapped Within The Meaning of Section 504 And Its Implementing Regulations.

1. Communicable Diseases May Be Handicaps Within the Meaning of Section 504.

Communicable diseases fall neatly within the framework of the Act, and a construction favoring their inclusion would effectuate the broad, remedial purpose envisioned by Congress for the Act, as the Court of Appeals determined. *Arline v. School Board of Nassau County,* 772 F.2d 759, 764 (11th Cir. 1985). A person with tubercu-

4. It should be noted in this connection that there are many instances covered by Section 504 in which the person's "qualifications" are relatively unimportant, such as discrimination in federally-assisted housing, transportation, health services, public assistance and other benefit programs. *Alexander v. Choate,* 105 S.Ct. 712 (1985); *Bowen v. American Hospital Ass'n,* 106 S.Ct. at 2114, S. Rep. No. 1297, at 6388-6391.

losis, or any other communicable disease, who is excluded on that basis from a covered program is "handicapped" within the meaning of the Act.

As stated above, a "handicapped individual" is defined as one who has, has had, or is perceived to have, a "physical or mental impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. § 706(7)(B). "Physical impairment" means, in this context, "any physiological disorder or condition" affecting one or more specified body systems. 45 C.F.R. § 84.3(j)(2)(i) (1985).

Invasion of the body by a disease causing microorganism is a physiological disorder. Communicable diseases may affect a specific body system, such as tuberculosis of the lungs. In general they affect the hemic and lymphatic system. Infectious diseases thus satisfy the definition of "impairment." 29 U.S.C. § 706(7)(B); 45 C.F.R. § 84.3 (j)(2)(i) (1985).[5] Such diseases may substantially limit major life activities by debilitating the individual generally or by affecting specific organs or systems.[6] Whether and to what degree the individual is "substantially limited"

5. As the American Medical Association and others point out, it is the disease or condition that constitutes the "impairment," not the limiting effects of the disease. *E.g.*, Brief of AMA at 24.

6. The length of time a person is impaired is one factor in determining how "substantial" the impairment is. Many communicable diseases have a short infectious period and the individual is ill only for a short period of time. Such diseases would be accommodated within a reasonable sick leave policy and would presumably not be the subject of a Section 504 employment action. *See* Brief of AMA at 15, n. 9. Diseases with a prolonged or chronic carrier stage or diseases exciting a great deal of apprehension are more likely to be the subject of discriminatory decisions and hence Section 504 cases. *See*, Burris, Fear Itself: AIDS, Herpes and Public Health Decisions, 3 Yale L. & Pol'y Rev. 479 (1985) (hereinafter cited as "Fear Itself.")

must be determined on a case-by-case basis and on medical criteria.[7] The contention that a person with a communicable disease is in some way unqualified to bring a cause of action under Section 504 finds no support in the case law, regulations, or legislative history of the Act. A person with a communicable disease who is substantially limited in a major life activity due to the effects of such a disease is clearly covered by the Act. 29 U.S.C. § 706(7)(B)(i).

Petitioner is somewhat equivocal on this point and at times appears to argue that communicable diseases are *per se* not handicaps. The Solicitor General appears to concede some inclusion, stating that discrimination against a person debilitated by a communicable disease on the basis of such impairment is unlawful. Brief of United States at 19-21. However, both the Solicitor and Petitioner would carve out an exception for discrimination based on a belief that the plaintiff's disease is contagious. In a recent opinion, the Office of Legal Counsel of the Justice Department has argued that even an irrational fear of "contagion" is a lawful basis for discrimination against persons with communicable diseases.[8]

This purported exception ignores the plain language of the definition of "handicapped individual." A person who is in fact able to transmit a serious disease to others

7. Where the discrimination takes place because the decisionmaker perceives the person to be handicapped, proof may consist of subjective evidence that the decisionmaker believed the person to be substantially limited. *See* Brief of AMA at 13, n. 5.

8. U.S. Justice Department, Office of Legal Counsel, Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, Re: Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus, hereinafter cited as Justice Department AIDS Opinion. A copy has been lodged with the Court by Petitioner.

in some manner is "substantially limited" through the inability to circulate freely among other people. Moreover, a person who "is regarded as having" an impairment which is substantially limiting fits within the statutory definition whether or not he or she is in fact impaired. 29 U.S.C. § 706(7)(B)(iii).[9] Such persons are, or are perceived as being, unable to associate with others at work, and thus limited in a major life activity specified in the regulations. 45 C.F.R. § 84.3(j)(2)(ii) (1985).[10] Although the inability to socialize or to be around other people is not listed in the definitional regulation, the listed activities are intended to be "representative rather than exhaustive," *Oesterling v.*

9. Congress clearly intended to cover persons who were incorrectly perceived as handicapped or whose impairments were incorrectly perceived as substantially limiting their activities. S. Rep. No. 1297 states at 6389-6390:

> Clause (C) in the new definition [29 U.S.C. § 706(7)(B)(iii)] clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, . . . This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within Clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

Both cases are reflected in the regulations defining "is regarded as having a handicap." 45 C.F.R. § 84.3(j)(2)(iv)(A) covers those who are incorrectly regarded as having a substantially limiting impairment when they are not so limited. Section 84.2(j)(2)(iv)(B) covers those limited only because of attitudes toward their impairment and § 84.3(j)(2)(iv)(C) covers those incorrectly regarded as having an impairment. Thus a person who is an asymptomatic carrier whose major life activities are in fact not limited would be covered if regarded as being casually contagious. *See also* Brief of AMA at 13, n. 5 and 24, n. 20.

10. " 'Major life activities' means functions *such as* caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1985), emphasis added.

Walters, 760 F.2d at 861, and courts have based a finding that an individual is handicapped on the inability to perform other activities such as to function under stress. *Doe v. New York University,* 666 F.2d at 775.

As the brief of the American Medical Association points out, modern techniques of medicine enable most individuals with tuberculosis to be rendered "noncontagious" within a relatively short amount of time if properly treated. Brief of AMA at 7. This is true of many other communicable diseases as well. *See generally,* A. Benensen, *Control of Communicable Diseases in Man.*[11] In addition, many communicable diseases are transmissible only through specific and limited means, particularly certain bloodborne viral diseases which involve a chronic carrier stage, such as AIDS and hepatitis B. *See id.* at 2-5, 171-181; Sande, Transmission of AIDS, The Case Against Casual Contagion, 314 N. Eng. J. Med. 380 (1986).

Whether as a matter of medical fact a given person with a communicable disease is actually capable of transmitting the disease, and whether his or her participation in the program or position involved is medically inappropriate, cannot be determined by blanket rules. An evaluation of the individual's medical status is required. In light of these factors and of the degree to which misconceptions about the "contagiousness" of various communicable diseases abound among laypersons, it is particularly inappropriate to telescope the entire inquiry regarding Section 504 in communicable disease cases into the definition of handicap as it applies to communicable diseases. Rather, the relevant inquiry is whether the person handicapped by a communicable disease is "otherwise qualified," that is,

11. Among diseases which regularly occur in the United States, the major exceptions at this time are acquired immunodeficiency syndrome (AIDS) and certain forms of hepatitis.

whether the person's medical condition disqualifies him or her for the program or position in question.

A judicial construction of "handicap" which excludes communicable diseases, or excludes discrimination based on "contagiousness," precludes persons with diseases of limited transmissibility (or persons incorrectly regarded as having such diseases) from showing that in the preponderance of medical opinion they present no significant risk. *Cf., Pushkin v. Regents of University of Colorado,* 658 F.2d at 1390. As the Justice Department Opinion on AIDS so forcefully and unfortunately demonstrates, such exclusion will permit, and perhaps even encourage, wholly arbitrary and irrational discrimination against such persons.

It was precisely this kind of arbitrary discrimination, based on ignorance, fear and mistaken assumptions about the limitations attendant on particular physical conditions, which the Rehabilitation Act was intended to combat. *See, e.g.,* S. Rep. No. 1297 at 6400; *Pushkin v. Regents of the University of Colorado,* 658 F.2d at 1385 ("Discrimination on the basis of handicap usually results from more invidious causative elements [than actual hostility] and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons"); *Southeastern Community College v. Davis,* 442 U.S. at 405, 412.

Protection against arbitrary discrimination is particularly important where communicable diseases are concerned. Some of these diseases have engendered a great deal of fear in the public at large, leading to decisions which lack a demonstrable medical or public health basis. *See* Fear Itself, 3 Yale L. & Pol'y Rev. 479 and case studies discussed therein; *see also New York State Ass'n for Retarded Children v. Carey,* 612 F.2d 644 (exclusion

of retarded children with hepatitis not supported by medical evidence). Since such diseases are physiological conditions, it is entirely appropriate to consider them as handicaps and thus protected under Section 504.

In sum, any person who is fired or otherwise excluded based on a program administrator's belief that he or she is "contagious" is *ipso facto* "regarded as having" an impairment (an infectious disease) which "substantially limits" a major life activity (the ability to be in contact with others), and must therefore be considered as handicapped within the meaning of 29 U.S.C. § 706(7)(B)(iii). The real question in a case involving a communicable disease is whether the exclusion is legitimate, that is, based on a sound and reasonable medical basis. However, that inquiry is better undertaken as part of the determination whether the person is "qualified" and not the determination whether he or she is "handicapped."

2. There is No Reason to Interpret Section 504 As Excluding Communicable Diseases.

Petitioner and the Solicitor General raise several arguments in opposing the inclusion of communicable diseases and real or perceived "contagiousness" as handicapping conditions. None of these can survive close scrutiny.

First, it is argued that the legislative history of the Act does not support such an inclusion. In fact, as the Court of Appeals noted, the legislative history does not speak directly to this point. *Arline v. School Board of Nassau County,* 772 F.2d at 764. This silence tips in favor of inclusion, not exclusion, however. In interpreting civil rights statutes having a broad, remedial purpose, courts are reluctant to adopt a limiting construction absent some legislative direction. *Grove City College v. Bell,* 465 U.S.

555, 564 (1984); *Alexander v. Choate,* 105 S.Ct 712 (1985). "Where the words and purpose of a statute plainly apply to a particular situation, . . . the fact that the specific application of the statute never occurred to Congress does not bar us from holding that the situation falls within the statute's coverage." *United States v. Jones,* 607 F.2d 269, 273 (9th Cir. 1979), *cert. denied,* 444 U.S. 1085 (1980). *See also Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories,* 460 U.S. 150 (1983).

Communicable diseases fall within the language of the statute and implementing regulations, as was stated above. They are "physiological disorders" which may substantially limit major life activities in many ways. If persons with a communicable disease are, or are regarded as being, capable of transmitting the disease through casual contact, they are, or are regarded as being, substantially limited in their contacts with others, clearly a major life activity.

Since communicability stems from the presence of a physiological disorder, the inclusion of communicable diseases as handicaps does not open the door to inclusion of other characteristics which may be the subject of unfavorable attitudes but are not physiologically or mentally based, or to inclusion of physical characteristics which are not "disorders" or "impairments," like lefthandedness, *de la Torres v. Bolger,* 781 F.2d at 1138, or high body density or curly hair, *Tudyman v. United Airlines,* 608 F.Supp. 739, 745-746. *See also Jasany v. United States Postal Service,* 755 F.2d at 1245-1250; *E.E. Black, Ltd. v. Marshall,* 497 F.Supp. 1088 (D. Haw. 1980). Communicability, moreover, is an intrinsic part of communicable diseases. Indeed, it is their distinguishing characteristic. There is no basis for separating out one such characteristic of a handicapping condition and excluding it from coverage. Inclusion of all characteristics or effects of communicable diseases, including communicability, is logical and will not stretch the meaning of the Act beyond its obvious limits. *Cf. Alexander v. Choate,* 105 S.Ct. at 720.[12]

Petitioner further argues that inclusion of communicable diseases would produce absurd results, such as the exposure of school children to persons with active tuberculosis. This argument ignores the further requirement that

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12. Physical characteristics which are not "impairments" or "disorders" are not covered, but those which are or stem from physical impairments or disorders are covered. The regulations specifically mention "cosmetic disfigurement." 45 C.F.R. § 84.3(j)(2)(ii). The Solicitor General thus sweeps too broadly in contending that physical appearance does not constitute a handicap. Like contagiousness, it can be an effect of a handicapping condition. If an employer or program administrator says that the discrimination is based on the handicapped person's appearance (e.g., a withered arm) and not on the fact of the handicap, that conduct is still covered under the Act. Appearance that results from a handicapping condition cannot be separated out as an uncovered characteristic any more than "contagiousness."

Indeed, the ambiguous reference to "appearance" at page 20 of the Solicitor General's brief illustrates the absurdity and circularity of singling out a particular characteristic of an impairment and contending that it is not a covered basis of discrimination because Congress intended only to cover "handicaps." Surely an employer or other program administrator could not refuse to hire a person disabled by polio simply on the ground that he or she found the person's appearance distasteful notwithstanding that the person was fully qualified for the position or program. *But see* Brief of United States at 23, n. 21. Congress clearly intended to cover such discrimination, as the legislative history of the Act cited herein amply demonstrates. Congress never intended to proscribe discrimination only if it was based on a belief that the handicapped person was functionally impaired. Antipathy or hostility is not a requirement for a claim under Section 504, but neither is it a defense. *See Pushkin v. Regents of the University of Colorado,* 658 F.2d at 1389-1390.

a person who establishes that he or she is handicapped must in addition be found qualified for the position or program in question. If it can be established under the procedure discussed in part II below that an individual in fact is capable of transmitting a serious disease in the workplace, the individual would not be qualified for certain kinds of employment.[13] However, to protect persons who have or are perceived as having diseases which are communicable only in a limited sense from arbitrary or irrational discrimination, and thus to fulfill Congress' intent that persons not be arbitrarily excluded on the basis of physical impairments, it is necessary to consider such persons as "handicapped individuals."

II. WHETHER A PERSON AFFLICTED WITH A COMMUNICABLE DISEASE SHOULD BE EXCLUDED FROM A PARTICULAR POSITION MUST BE DECIDED CASE-BY-CASE BASED ON REASONABLE JUDGMENTS IN LIGHT OF THE MEDICAL EVIDENCE.

Once a person is deemed handicapped, the key inquiry is whether he or she is "otherwise qualified" for the program or position sought. Generally an otherwise qualified person is one who is able to meet all of a program's requirements with some accommodation but without a fundamental alteration of the program's requirements. *Southeastern Community College v. Davis,* 442 U.S. at 406, 413; 45 C.F.R. § 84.12 (1985). Amici States generally concur with the brief of the American Medical Association that whether a person is "otherwise qualified" requires an individualized, case-by-case approach not a blanket rule with

13. However, contagiousness may not be related to whether one is "otherwise qualified" for certain programs such as hospital or nursing home care or welfare benefits which are also covered under the Act, and may be important in cases involving communicable diseases.

respect to all diseases including tuberculosis. Brief of AMA at 18-20. The record in the present case is too sparse to ascertain whether the trial court applied the proper analytical framework. This Court should, therefore, remand and offer guidance to the trial court to assist it on remand in properly applying Section 504. *Cf. McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798 (1973).

In a Section 504 case involving a communicable disease there must be an individualized inquiry by the trial court to determine whether the individual is "otherwise qualified" given the degree to which his or her condition poses a risk of harm to others in that particular context.

This is precisely the way courts have approached other Section 504 cases involving a risk of harm. *See, e.g., Doe v. New York University,* 666 F.2d at 777-779; *Doe v. Region 13 Mental Health-Mental Retardation Commission,* 704 F.2d at 1412; *Pushkin v. Regents of University of Colorado,* 658 F.2d at 1386-1387; *New York State Ass'n for Retarded Children v. Carey,* 612 F.2d at 649-650; *Strathie v. Department of Transportation,* 716 F.2d 227, 231-232 (3rd Cir. 1983); *Mantolete v. Bolger,* 767 F.2d 1416, 1422-1424 (9th Cir. 1985). In such cases courts first ascertain the medical facts regarding the individual's condition and the degree of risk it poses, then evaluate the reasonableness of the agency's or employer's decision, giving the plaintiff the opportunty to rebut the evidence offered by the decisionmaker. *E.g., Pushkin,* 658 F.2d at 1387; *Doe v. New York University,* 666 F.2d at 777.

Where the decision was based on unfounded assumptions about plaintiff's condition or the risks involved, the plaintiff has prevailed. *E.g., Pushkin; New York Ass'n for Retarded Children; Strathie; Grube v. Bethlehem Area School District,* 550 F.Supp. 418 (E.D. Pa. 1982); *Poole v.*

South Plainfield Board of Education, 490 F.Supp. 948 (D.N.J. 1980). Where the court considers the decision a reasonable one in light of the risks posed by plaintiff, the decision to exclude has been upheld. *E.g., Doe v. NYU; Doe v. Region 13.* Section 504 cases involving communicable diseases fit comfortably into this framework. In the case of communicable diseases, there will be situations when the plaintiff's condition is such that it is reasonable to preclude employment in the position sought. In other situations, however, the risk of harm may be so attenuated that it is unreasonable to exclude the individual from employment.[14] In cases involving health care facilities a patient may be "qualified" despite a highly contagious condition. But as in Section 504 cases generally, the assessment of the risk must be based on medical evidence and not on preconceptions, mistaken assumptions or stereotypes. *Pushkin v. Regents of University of Colorado,* 658 F.2d at 1385. "[A] good faith or rational belief on behalf of the employer will not be a sufficient defense." *Mantolete v. Bolger,* 767 F.2d at 1423. *See also Pushkin,* 658 F.2d at 1383, 1390.

Moreover, the reasonableness of the decision to exclude must be evaluated by the court not simply on evidence the decisionmaker actually had at the time of the decision. The decisionmaker has an obligation under the Act to gather sufficient information both from the handicapped

14. Although the cases are not uniform, a substantial risk is ordinarily required before a handicapped person may be excluded. *See, e.g., Doe v. New York University,* 666 F.2d at 777 ("a significant risk of harm," though less than fifty percent); *New York Ass'n for Retarded Children v. Carey,* 612 F.2d at 650 ("some substantial showing" of a health hazard); *Strathie v. Department of Transportation,* 716 F.2d at 232 (some "appreciable risk"). No case requires a plaintiff to demonstrate to a near certainty that he or she does not pose any risk to others, even though the risks posed could be quite serious. The Justice Department AIDS opinion at 38-39 would impose such a burden in cases involving AIDS.

individual and from qualified experts and such resources as published guidelines of the United States Public Health Service to determine whether employment or inclusion in the program would be possible without a reasonable probability of a significant risk of harm. *See Mantolete v. Bolger,* 767 F.2d at 1423.

In addition, a plaintiff should not be precluded from rebutting the evidence offered by the decisionmaker and attempting to show that the decision was based on incorrect information or assumptions, so long as the evidence reflects the state of medical knowledge and plaintiff's condition at the time the decision was made. As the 1974 Senate Report stated, discrimination against the disabled is often the result of "archaic attitudes and laws" and lack of understanding by the public "about the potential of these individuals to contribute significantly to society." S. Rep. No. 1297 at 6400. To preclude a plaintiff altogether from rebutting an employer's contentions "would be to preclude individual plaintiffs from ever rebutting the reasons articulated by a defendant for the actions which it has taken. Indeed it would preclude relief under § 504." *Pushkin,* 658 F.2d at 1390. *See also New York Ass'n for Retarded Children v. Carey,* 612 F.2d at 649-650.

As the Court of Appeals pointed out in *New York Ass'n for Retarded Children,* 612 F.2d at 649, n. 5, Section 504 is part of the general corpus of discrimination law. It was enacted within months of this Court's decision in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792. Congress was undoubtedly aware of this Court's determinations regarding burdens of proof in that case. As in Title VII, in Section 504 Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on

the basis of [an] impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). To effectuate this purpose, it is necessary to allow the plaintiff an opportunity to show that the decisionmaker's proffered reasons do not have a valid basis in fact. *E.g., Strathie v. Department of Transportation; Pushkin.* In the context of determining whether a handicapped person is "otherwise qualified" actual hostility or invidious intent need not be shown since often discrimination against the handicapped is based on ignorance or mistaken assumptions about their capabilities. *See Alexander v. Choate,* 105 S.Ct. at 718; S. Rep. No. 1297.

In short, as in other Section 504 cases and other discrimination cases, a full and fair opportunity must be given to the person handicapped or perceived to be handicapped by a communicable disease to establish that he or she is in fact qualified for the position or program and poses no significant risks.

III. SECTION 504, AS APPLIED TO CASES INVOLVING COMMUNICABLE DISEASE, CAN BE HARMONIZED WITH PUBLIC HEALTH LAW.

Both Petitioner and the Solicitor General argue that inclusion of communicable diseases within the ambit of Section 504 would infringe on the delicate state-federal balance and upset existing public health statutes. On the contrary, the two schemes can be harmonized.

The control of communicable diseases is a matter of both state and federal concern. Early, and largely ineffectual, efforts to prevent the spread of communicable disease though such methods as quarantine were enacted in response to severe epidemics, at a time when the etiology of epidemic diseases was not at all understood by the majority of the medical profession, let alone by lay persons. *See* C. Winslow, *The Conquest of Epidemic Diseases*

193-235.[15] Once the medical and public health professions had succeeded in identifying particular communicable diseases and their modes of transmission, strategies could be designed to eliminate particular modes of transmission such as insect carriers or contaminated water or food products, or particular disease organisms through antibiotic drugs, or to improve general immunity through vaccination programs. *Id.*, at 362-380; Morgenstern, The Role of the Federal Government in Protecting Citizens From Communicable Diseases, 47 U. Cinn. L. Rev. 537, 541-546 (1978) (hereinafter cited as "Communicable Diseases"). Today, the federal effort largely consists of the gathering of statistics and providing funds for research and for assistance to States in developing comprehensive health planning and immunization programs. *E.g.*, 42 U.S.C. § 247b. *See* Morgenstern, 47 U. Cinn. L. Rev. at 543-545. In addition, designated federal officials have the power to apprehend or detain persons with a communicable disease in a communicable stage to prevent the spread of certain diseases designated by the President, including preventing such persons or contaminated goods from entering the United States. 42 U.S.C. § 264b.

States commonly have undertaken compulsory immunization programs, particularly for school children.[16] Re-

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15. The early federal laws concerning quarantine were enacted following a serious epidemic of yellow fever in Philadelphia, then the nation's capitol, in 1793. *See* Morgenstern, The Role of the Federal Government in Protecting Citizens from Communicable Diseases, 47 U. Cinn. L. Rev. 537, 541 (1978); C. Winslow, *The Conquest of Epidemic Disease* 193-235. The disease was brought under control by controlling the carrier mosquitoes, C. Winslow, at 353-357, and by development of a vaccine. A. Benensen, *Control of Communicable Diseases in Man* 438.

16. *E.g.*, Cal. Health & Saf. Code, §§ 3380-3390; N.Y. Pub. Health Law, § 680 (McKinney 1985). *See* Morgenstern, Communicable Diseases, 47 U. Cinn. L. Rev. at 544, n. 62.

porting of communicable diseases is also common.[17] Most States also entrust public health officials with broad, general powers to quarantine and isolate individuals where necessary to protect or preserve the public health. *E.g.*, Cal. Health & Saf. Code, §§ 3051, 3123 (West 1979); N.Y. Pub. Health Law § 2100; Title 10, New York Admin. Code § 2.5 *et seq.*, § 2.25 *et seq.* Similarly, isolation may sometimes be compelled in cases where a person with a communicable disease in a transmissible state refuses to follow the prescribed course of treatment. *E.g.*, Cal. Health & Saf. Code, §§ 3193, 3351 (West 1979); Cal.Admin. Code, Title 17, §§ 2624, 2636(m) (1983).

The Solicitor General suggests that including actions based on contagiousness within the ambit of Section 504 will make such control efforts subject to suit and thus inhibit the ability of States and the federal government to protect the population from communicable disease. On the contrary, in at least 16 States and the District of Columbia some or all communicable diseases are already covered under state handicap discrimination laws. Obviously these States perceive no such conflict.[18] No such conflict exists

17. Cal. Health and Saf. Code, § 3123 (West 1979); N.Y. Pub. Health Law §§ 2101-2105 (McKinney 1985); Title 10, New York Admin. Code §§ 2.10-2.18. New York defines AIDS as a communicable disease only for reporting purposes. Title 10, New York Admin. Code 24-1.1 *et seq.*

18. The States are: Colorado, 1 AIDS Pol'y & L. (BNA) No. 13, p. 4 (July 16, 1986); Delaware, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); Florida, 1 AIDS Pol'y & L. No. 11, p. 3 (June 18, 1986); Maine, 2 Empl. Prac. Guide (CCH) ¶ 5023; Massachusetts, 2 Empl. Prac. Guide (CCH) ¶ 5025; Minnesota, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); Missouri, 1 AIDS Pol'y & L. (BNA), No. 11, p. 3 (June 18, 1986); New Hampshire, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); New Jersey, 2 Empl. Prac. Guide (CCH) ¶ 5026; New Mexico, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); *New York, People v. 49 West 12 Tenants Corp.*, No. 43604/83

(Continued on following page)

where immunization programs are concerned, since they apply across the board, for example to all children entering school, and therefore do not single out persons who have communicable diseases.[19] Similarly, reporting statutes, unless they also require exclusion from some federally assisted program, would not be covered by Section 504.

With respect to other actions which do single out persons with communicable diseases, public health agencies are already subject to suit in federal court on constitutional grounds for actions which invade individual privacy or restrain personal liberty. *E.g.*, *Camara v. Municipal Court,*

(Continued from previous page)

(Sup. Ct., NY Co., Oct. 17, 1983); N.Y. Exec. Law §§ 296, 292.21 (McKinney 1985); the State Division of Human Rights has determined that the New York Human Rights Law protects against discrimination because a person has AIDS or is regarded as having AIDS. DHR Release No. 86067727 (1986); Oregon, 2 Empl. Prac. Guide (CCH) ¶ 5020; Rhode Island, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); Texas, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); Wisconsin, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); Washington, 1 AIDS Pol'y & L. (BNA), No. 11, p. 3 (June 18, 1986); Opinion Letter of John H. Suda, Acting Corporation Counsel, District of Columbia (Oct. 15, 1985). California's Fair Employment statute, Cal. Government Code § 12940, was broadly construed in *American National Ins. Co. v. Fair Employment and Housing Comm.*, 32 Cal.3d 603, 651 P.2d 1151, 186 Cal. Rptr. 345 (1982), as precluding any arbitrary discrimination against a physical condition that is actually or potentially handicapping, including illnesses. In California the Department of Fair Employment and Housing accepts complaints of discrimination against people with AIDS and has contended that AIDS is covered as a handicap under state law. *Department of Fair Employment and Housing v. Raytheon Co.*, FEHC Case No. FEP 83-84, L1-0310p. The issue is now pending before the Fair Employment and Housing Commission.

19. Under a Section 504 analysis it would be permissible to exclude temporarily from school a child who refuses immunization and who has the disease in question in an infectious stage until the end of the infectious period. Such a child is not "otherwise qualified" for school attendance while actually infectious. See part II above. The infectious stage of diseases for which immunization is required is typically short.

387 U.S. 523 (1967); *See v. City of Seattle,* 387 U.S. 541 (1967) (housing code and fire code inspections challenged on Fourth Amendment grounds); *Jew Ho v. Williamson,* 103 F. 10 (1900) and *Wong Wai v. Williamson,* 103 F. 1 (1900) (quarantine of 12 city blocks and inoculation order directed at Chinese challenged on Equal Protection and Due Process grounds). Therefore restrictive measures such as quarantine and isolation orders directed at groups of people or individuals are already subject to challenge.[20]

Generally speaking, such actions have been upheld where public health officials can demonstrate a public health necessity, that is, the existence of a public health problem and at least a rational and demonstrable relationship, based on medical evidence, between the means chosen and the problem. Where individual liberty is restrained, the least restrictive alternative must also be chosen. *See, generally,* Fear Itself, 3 Yale L. & Pol'y Rev. at 481, 488-495; Mills, Mills and Wofsy, The Acquired Immunodeficiency Syndrome, Infection Control and Public Health Law, 314 N. Eng. J. Med. 931, 934 (1986).

Adding a cause of action under Section 504 to possible constitutional challenges to public health measures

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20. In any event, quarantine is used quite sparingly today.

Quarantine as a strategy for infection control has generally been used only in individual cases for narrow purposes: to enforce the treatment of a noncompliant patient infected with tuberculosis, to segregate a patient with an untreatable but self-limited disease such as smallpox, or to control the spread of a severe and highly communicable disease such as plague. Quarantine has been used only rarely for patients with sexually transmitted diseases. Long-term quarantine of large populations in isolated communities has been invoked in the 20th century only for leprosy, and that use is now widely thought to have been unjustified.

Mills, Mills & Wofsy, Acquired Immunodeficiency Syndrome, Infection Control and Public Health Law, 314 N. Eng. J. Med. 931, 934 (1986).

would add little, if anything, where extremely restrictive actions like quarantine or isolation are concerned, since the highest constitutional standards would already obtain. It would not preclude isolation or confinement where the medical facts justify such action.

Section 504's greatest impact would be on decisions or regulations restricting carriers of certain diseases from school or certain kinds of employment, for example the exclusion of retarded children who were carriers of hepatitis B which was challenged in *New York Ass'n for Retarded Children v. Carey,* 612 F.2d 644, or the decision in the instant case. As in the employment context generally, allowing a cause of action to be maintained does not mean that exclusions which are based on demonstrable and supportable medical concerns will not ultimately be upheld. It simply subjects such decision to scrutiny and allows those which are not or cannot be supported to be set aside. If Section 504 were invoked to preclude actions by public health officials which were based on irrational, uninformed or medically unsupportable distinctions, the public interest would be furthered not hindered.

Moreover, subjecting state police power actions to federal non-discrimination requirements has direct paralells both in Section 504 cases and in discrimination law generally. The State's power to protect the public from communicable diseases is qualitatively no different than its power to protect school children from unsafe transportation. Yet Section 504 applies in that context. *Strathie v. Department of Transportation,* 716 F.2d 227. *See also Kampmeyer v. Nyquist,* 553 F.2d 296 (2d Cir. 1977); *Grube v. Bethlehem Area School Dist.,* 550 F.Supp. 418; *Poole v. South Plainfield Board of Education,* 490 F. Supp. 948 (handicapped students in high school athletics).

Federal non-discrimination law generally applies to innumerable areas primarily left to the States such as

education, and even the hiring of state employees. *Dothard v. Rawlinson,* 433 U.S. 321 (1977). *See* 42 U.S.C. 2000e(a). Courts are quite familiar with such problems and are able to administer and harmonize overlapping regulatory systems, particularly in the area of civil rights. Unlike the situation in *Bowen v. American Hospital Ass'n,* 106 S.Ct at 2120, the inclusion of communicable diseases within the ambit of Section 504 does not reorder the priorities of state regulatory agencies nor enlist them as "foot soldiers in a federal crusade." *Bowen,* 106 S.Ct. at 2120. Indeed, it would not alter the balance between state and federal authority.

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CONCLUSION

Legislative history, case law and administrative regulations interpreting Section 504 require the inclusion of communicable diseases as covered handicaps under Section 504. This construction is necessary to foreclose arbitrary discrimination against persons with such diseases. The determination whether a person with a communicable disease in fact poses a risk to others, and may therefore lawfully be excluded, should be made in determining whether such person is qualified for the program or position in question, and not in determining whether the person should be covered by Section 504 at all.

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